Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

IN RE: JOHN W. ASKEY AND BARBARA ASKEY
Debtors,

JOHN W. ASKEY AND BARBARA ASKEY,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTION PRESENTED

I.

Is the Commonwealth immune from suit to determine the dischargeability of a debt under the United States Bankruptcy Code due to the application of the Eleventh Amendment to the United States Constitution?

LIST OF ALL PARTIES

1. John W. Askey and Barbara Askey, Plaintiff-Petitioner

2. PA Department of Welfare, Defendant-Respondent

3. Solicitor General, U.S. Department of Justice

4. U. S. Trustee for the Western District of Pennsylvania

5. James Walsh, Esquire, Chapter 7 Trustee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule of Appellate Procedure 29.6, Law Care and Attorney David A. Colecchia make the following disclosure:

1) The inquiry for non-governmental corporate parties is not applicable.

2) The inquiry for non-governmental corporate parties that hold more than 10% of the party's stock is not applicable

3) The inquiry regarding a publicly held Corporation that is not a party but has a financial interest in the outcome of these proceedings is not applicable.

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OPINIONS AND ORDERS BELOW

On February 14, 2001, Judge Markovitz of the United States Bankruptcy Court for the Western District of Pennsylvania issued a memorandum opinion that dismissed the Petitioners complaint due to Eleventh Amendment sovereign immunity. A copy of this Opinion and Order is attached to this Petition at App. 1-12. On February 12, 2002, District Court Judge William Standish affirmed the Bankruptcy Court's dismissal in a Memorandum Opinion. A copy of the District Court's Opinion is attached to this Petition at App. 13-21. The Debtors appealed to the U.S. Third Circuit of Appeals and on November 27, 2002, it issued an Unpublished Memorandum Opinion again denying the Debtors' requested relief. A copy of the Third Circuit Court of Appeals Opinion is attached to this Petition and incorporated at App. 22-25.

STATEMENT OF JURISDICTION

A Writ of Certiorari is sought from the November 27, 2002 unpublished opinion of the United States Court of Appeals for the Third Circuit dismissing the Petitioners' appeal. Such opinion affirmed the District Court's determination that the Commonwealth of Pennsylvania Department of Public Welfare was immune pursuant to the **Eleventh Amendment** to the United States Constitution from suit filed by the Debtors pursuant to the United States Bankruptcy Code to determine the dischargeability of a debt the Debtors allegedly owed the Commonwealth.

This Court has jurisdiction to hear this matter through a Writ of Certiorari pursuant to **28 U.S.C. 1254(1)**. This Court has the authority pursuant to **28 U.S.C. 1651(9)** to issue all necessary and appropriate Writs in aid of its respective jurisdiction that are agreeable to the usages and principles of law.

The time for filing a Petition for a Writ of Certiorari commenced to run on November 27, 2002 when the Clerk for the United States Court of Appeals for the Third Circuit entered Judgment on the Court's Opinion. The time for filing a Petition expires on February 25, 2002.

While the Debtors on both April 28, 2001 and May 10, 2002 notified the United States Attorney General of the existence of a constitutional question at no time has the Commonwealth of

Pennsylvania fulfilled the requirement of 28 U.S.C. §2403(a) and given notice to any Federal Agency of the existence of a Constitutional question.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION ARTICLE 1, SECTION 8, CLAUSE FOUR

Congress shall have the power to . . . . . establish . . . an uniform laws on the subject of Bankruptcies throughout the United States;

ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. §106(a)

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205,

1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this Title.

(2) The Court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The Court may issue against a governmental unit an Order ... or judgment under such section ..., include and Order or judgment awarding a money recovery, but not including an award of punitive damages ....

(4) The enforcement of any such order ... or judgment against any governmental unit shall be consistent with appropriate non-bankruptcy law applicable to such governmental unit....

STATEMENT OF THE CASE

The case of John and Barbara Askey verses the Pennsylvania Department of Welfare started with the filing of a Petition to determine dischargeability by the Debtors for a reimbursement debt owed to the Pennsylvania Department of Welfare. In the Complaint, the Debtors alleged that during 1990 they separated. Ms. Askey filed for and received Assistance through the **Federally** Funded, emphasis added, Aid to Families with Dependent Children Program, hereinafter AFDC benefits.

Ms. Askey received AFDC benefits and as the result of receiving those benefits was required to file for child support through the PA Department of Welfare, which she did. Shortly thereafter Mr. and Mrs. Askey reconciled and neither attended the scheduled Support Conference. As the result of

neither party attending the Support Conference, no Order was entered. However, Ms. Askey continued to receive AFDC benefits. At no time did Westmoreland County Domestic Relations inform the Department of Welfare of Ms. Askey's non-compliance and at no time did anyone follow-up and act to take Ms. Askey off the AFDC rolls.

These sums of the moneys accumulated until April 6, 1999 when the Department of Welfare reopened the case and held a Hearing before Hearing Officer Michelle Bononi. At that time she entered an Order requiring Mr. Askey to pay fifty dollars per month for the support of Barbara Askey, his wife, and James Askey and John Askey, Mr. Askey's sons as a method to recover these monies. This Order was to continue until all the AFDC money Mr. Askey's wife received was repaid. Arrears were set at $12,212.

Mr. Askey labored under a wage attachment at fifty dollars per month until March 24, 2000 when he filed for bankruptcy under Chapter 13. On June 26, 2000, Mr. Askey filed a Complaint to determine the dischargeability of the Welfare arrears debt he allegedly owed to the Pennsylvania Department of Welfare. This Complaint sought a dischargeability determination and the right to recover moneys Mr. Askey gave the Commonwealth through a wage attachment as preferences. While the Complaint to determine dischargeability was pending Mr. Askey converted this case to a Chapter Seven bankruptcy on August 16, 2000.

In its Complaint the Debtors' asserted that this debt is dischargeable under both **11 U.S.C. 523(a)(5), 11 U.S.C. 523(a)(18),** and **42 U.S.C. Section 408(a)(3)**. The Commonwealth of Pennsylvania responded and allegedly asserted sovereign immunity as a defense to this action. This case was briefed on the merits only as the Commonwealth did not brief the sovereign immunity argument before the Honorable Bankruptcy Court Judge Markovitz. The Commonwealth also did not give the required notice to the Solicitor General under **28 U.S.C. §2403(a)** of its challenge to the Constitutionality of **Section 106** of the Bankruptcy Code, as it was required to do. The case was orally argued on the merits only to Judge Markovitz on January 11, 2001. Debtor's Counsel did not brief the Commonwealth's immunity argument due to no notice.

On February 14, 2001, Judge Markovitz *sua sponte* issued an Order dismissing the Debtors' Petition because of sovereign immunity. Judge Markovitz relied upon the Third Circuit's decision in ***Sacred Heart Hospital v. Dep't of Pub. Welfare, (In Re: Sacred Heart Hospital,*** 133 F.3d 237 (3d Cir. 1998) to support his finding. On February 26, 2000, Debtors appealed Judge Markovitz's decision to the U. S. District Court of Western PA. All sides briefed the immunity issue.

In its brief, Plaintiffs contended that Judge Markovitz erred insofar as he failed to give the Plaintiffs the opportunity under ***Ex Parte Young*** to change the caption of the Pleading to include a request for injunctive relief against the Head of the

Department of Welfare. Plaintiffs also raised the applicability of ***Sacred Heart Hospital*** to the within matter in addition to referencing a split within the Third Circuit itself concerning its applicability. The Western District Bankruptcy Court with its ruling in Mr. Askey's case was directly in conflict with the Delaware Bankruptcy Court which held in ***In re Hechinger***, 254 B.R. 306 (Bank. Del 2000) that requests to determine dischargeability were not proceedings to which Eleventh immunity protection applied.

The Honorable Judge Standish of the United States District Court on February 12, 2002 issued an Order confirming Judge Markovitz's finding regarding the Commonwealth's sovereign immunity argument. In his opinion, Judge Standish reported no reference to the current split in the Third Circuit between the Delaware Bankruptcy Court and the Western District concerning sovereign immunity. Judge Standish also omitted a responding to the applicability of the ***Sacred Heart Hospital*** case.

The Debtors again appealed to the Third Circuit Court of Appeals. In its brief, the Appellants again referenced the split in the Circuit between the Delaware District Court in ***Hechinger*** and this case. The Appellants noted in their brief that ***Hechinger*** was a connected case, involved the same issue, and it was on appeal to the Third Circuit at Court Number 02-1917. On November 27, 2002 the Court issued its opinion and again denied the Debtors relief. The Court made no analysis of the applicability of ***Sacred Heart Hospital*** to the within matter and just stated

that it applied despite the Debtors' arguments to the contrary.

This Petition for a Writ of Certiorari resulted.

REASONS FOR THE GRANT OF A WRIT OF CERTIORARI

At one time, a State could not assert the doctrine of sovereign immunity to defeat a Debtor's right to proceed in bankruptcy and discharge a debt owed the State. This changed in 1998, when the Third Circuit, reversed the long held standard and now permitted States to raise an impenetrable shield defeating any claim raised by a Debtor. This reversal in the law spread to other Circuits across the United States and has been fiercely resisted by Bankruptcy and Districts Courts. This holding also trampled on well-settled principles of Federalism, turned this Constitution on its head and revitalized the Standard set forth in the Articles of Confederation. The Askeys' have been denied the opportunity to discharge their debt in bankruptcy by these events. They ask the U.S. Supreme Court to reverse this holding for the reasons that follow.

All the Courts Below committed reversible error by finding the Commonwealth of Pennsylvania immune from suit under the Constitution's Eleventh Amendment.

The Third Circuit Court of Appeals, the United States District Court for the Western District of Pennsylvania, and the United States Bankruptcy Court for the Western District of Pennsylvania determined that the Commonwealth of Pennsylvania, Department of Public Welfare (DPW), was immune to Debtors' suit to determine the dischargeability of a

debt under the **Eleventh Amendment**[1] based on the reasoning of ***In Re Sacred Heart Hospital of Norristown***, 133 F.3d 237 (3rd Cir. 1998).

In ***Sacred Heart***, a hospital filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code and, during those proceedings,

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[1] The plain language of the Eleventh Amendment indicates that it applies only to suits against a State by Citizens of another State; however, the amendment has been construed to also preclude suits against a State by its own Citizens. ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44 (1996). The **Eleventh Amendment** recognizes that States are sovereign entities in our federal system of government and that, as a sovereign, a State is inherently not subject to suit by an individual without its consent. ***Id.***; ***Hans v. Louisiana***, 134 U.S. 1 (1890).

The **Eleventh Amendment** is not an absolute barrier to suing a State in Federal Court. A State may waive its Eleventh Amendment immunity and thereby subject itself to suit. ***Lavia v. Pennsylvania***, 224 F.3d 190 (3rd Cir. 2000). Furthermore, Congress may abrogate the States' immunity by statute. ***Id.*** To determine whether a statute has that effect, Courts consider whether Congress unequivocally expressed its intent to abrogate immunity, and whether Congress acted pursuant to a valid exercise of power. ***Id.***; ***Seminole Tribe.***

filed various claims against agencies of the Commonwealth of Pennsylvania, including DPW. Concerning ***Sacred Heart*** the hospital provided services to indigent persons and then billed DPW for the cost of those services in accordance with the Medical Assistance Program. DPW, however, refused to pay for medical services the hospital rendered.

Consequently, the hospital initiated an adversary proceeding in the Bankruptcy Court and demanded a judgment against the Commonwealth Agency for the amount it was entitled to under the Medical Assistance Program. DPW defended against the hospital's action by moving to dismiss based on **Eleventh Amendment** immunity; however the Bankruptcy Court denied the motion to dismiss and subsequently entered judgment in the hospital's favor. The District Court reversed that decision and an appeal to the Third Circuit ensued.

The Third Circuit was faced with the issue of whether Congress, by enacting, **Section 106 of the Bankruptcy Code, 11 U.S.C. § 106**, had abrogated sovereign immunity under the Eleventh Amendment. This statute was unambiguously intended by Congress to abrogate sovereign immunity in bankruptcy cases brought under numerous Sections of the Bankruptcy Code. To determine whether **11 U.S.C. § 106** was a valid exercise of the power of Congress, the Court relied upon this Court's opinion in ***Seminole Tribe***, where it stated that:

> **[e]ven when the Constitution vests complete law-making authority over a particular area,**

> **the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III and Article I cannot be used to circumvent the Constitutional limitations placed upon Federal jurisdiction.** *Seminole Tribe*, 517 U.S. at 72-73 (footnote omitted.)

The power to establish bankruptcy law is set forth in **Article I of the United States Constitution**. Therefore, finding no reason to distinguish the Bankruptcy Clause from any other **Article I** power, and finding that Congress did not enact **Section 106** pursuant to the Fourteenth Amendment, the Third Circuit held that **Section 106(a)** was unconstitutional attempt to abrogate sovereign immunity through its Article I powers. Accordingly, the Court determined that DPW was immune from suit.

Nonetheless, Debtors invite this Court to review the holding of ***Sacred Heart***, or to decline to extend it to the facts of this case, in the light of the following arguments:

(a) The Instant Case Is Distinguishable From *Sacred Heart*.

In ***Sacred Heart***, the hospital was seeking an Order from the Bankruptcy Court that would force DPW to pay for medical treatment it had provided to indigent persons. Debtors here, however, are seeking an Order finding that the debt at issue may be discharged in bankruptcy; they are not asking the

Bankruptcy Court to enter a judgment against DPW that would be paid from the Commonwealth treasury. Hence, while this case is an adversary proceeding and DPW is a named Defendant, it is not fundamentally different from a situation where a Bankruptcy Court is determining only the dischargeability of a debt to a State Creditor. Such actions have been held not to conflict with the Eleventh Amendment, because jurisdiction derives from the Federal Court's authority over the Debtor and the bankruptcy estate, and because the State is not required to participate in the bankruptcy proceeding. ***In re Collins***, 173 F.3d 924 (4th Cir. 1999); ***Texas v. Walker***, 142 F.3d 813 (5th Cir. 1998).

By improperly applying ***Sacred Heart*** to the Debtors' situation despite contrary decisions in other Circuits the Third Circuit Court of Appeals created a situation that necessitates review under **U.S. Supreme Court Rule 10(a).**

(b) A Lawsuit To Determine Dischargeability of a Debt Is Not a Proceeding Within The Meaning of the Eleventh Amendment.

This Court's decision in ***Sacred Heart Hospital*** is also distinguishable by the Bankruptcy Court's holding in ***In Re Hechinger Investment Co. of Del***, 254 B.R. 306 (Bank. Del 2000) held that a lawsuit to determine the dischargeability of a claim is not a suit within the meaning of the **Eleventh Amendment.** Hechinger involved a Motion by a Chapter 11 Debtor to sell land pursuant **11 U.S.C. Sections 363 and 356 of the Bankruptcy Code.** ***Id.*** at 309. The Debtor also

proposed that such transfers were exempt from State transfer tax pursuant to **11 U.S.C. Section 1146(c)** of the Bankruptcy Code. ***Id.*** Because the subject property was located in Maryland the State and Counties involved in the sale objected and asserted sovereign immunity as a defense. ***Id.***

The Court held citing ***Elderman v. Jordan,*** 39 L.Ed2d 662 (1974) that the **Eleventh Amendment** only applied to lawsuits against the State. ***Id.*** at **311**. A lawsuit against the State in the Delaware Bankruptcy Court's view involved only lawsuits against the State for a money judgment. ***Id.*** The ***Hechinger*** Court recognized that the majority view was that an adversary proceeding against a State is a proceeding is a suit under the **Eleventh Amendment**. ***Id. Citing Chandler v. Oklahoma ex rel Oklahoma Tax Comm'n (In Re Chandler),*** 251 B.R. 872, 875-876 (10th Cir. 2000).

The ***Hechinger*** Court rejected Maryland's contention that because the State had a loss or a potential loss that it was immune under **Eleventh Amendment** grounds. ***Id.*** at 313-314. The Court was concerned that such a ruling was too broad and that such an interpretation would result in the State receiving Constitutional immunity from Federal Law. ***Id.*** at 314. The Court limited **Eleventh Amendment** substantive immunity to lawsuits involving State *qua* State. A declaratory ruling interpreting bankruptcy law only derived from the Court's jurisdiction over the Debtors and their estate. ***Id.*** It did not depend on jurisdiction over Maryland. ***Id.*** In the Court's view, the effect that such ruling prohibited Maryland from

collecting a transfer tax was a function of substantive Federal law and not a violation of Maryland's constitutional rights. Recently in ***In Re: Polygraphex Systems***, 2002 Bankr. LEXIS 241 (Bank. M.D. Fl. 2002) the Tampa Bankruptcy Court accepted the ***Hechinger*** Court's view and refused to find **Eleventh Amendment** immunity concerning the Debtor's objection to a Proof of Claim issued for ad valorem taxes.

The Delaware District Court's holding in *Hechinger* creates an impermissible schism between this Circuit's District Courts that this Court must resolve pursuant to Supreme Court Rule 10(c). The Delaware District Court is correct that by following the Seminole Tribe decision to its logical conclusion leads to complete immunization of the State from Federal Law and turns the Constitution into the Articles of Confederation. The issue concerning the limits of Eleventh Amendment immunity in Bankruptcy is that must be settled by this Court pursuant to **Supreme Court Rule 10(c).**

Applying the ***Hechinger*** analysis to Mr. Askey's situation it is clear that the State is not immune because the Court is merely exercising jurisdiction over the Bankrupt estate and managing the orderly disposition of the Bankrupt's assets and liabilities. If the issue is the recovery of a preference from the State treasury then that portion of the request for relief could be severed from the Debtor's Complaint and the case could be allowed to move forward. Again, the Court erred by failing to apply the proper standards.

Moreover, in ***In re Bliemeister***, 251 B.R. 383 (Bkrtcy. D. Ariz. 2000), the United Stated Bankruptcy Court of Arizona concluded that an adversary proceeding to determine the dischargeability of a debt was within the scope of the Court's *in rem* jurisdiction and, for that reason, fell into an exception to Eleventh Amendment immunity.[2] The ***Bliemeister*** Court's reasoning relied on the Supreme Court's decision in ***California and State Land's Commission v. Deep Sea Research***, 523 U.S. 491 (1998), which held that the Eleventh Amendment did not bar an *in rem* Admiralty suit where State did not have possession of the *res*. In the present case, Debtors have filed an adversary proceeding with the Bankruptcy Court to determine whether its debt to DPW should be discharged, and DPW does not have possession of any *res*. Based on the reasoning of ***Bliemeister*** and ***California and State Land's Commission***, Debtors believe that the this action falls into the *in rem* jurisdiction of the Bankruptcy Court and that DPW is not immune under the **Eleventh Amendment**.

The debt at issue is essentially an attempt by DPW to recoup welfare cash assistance benefits that DPW paid during years 1990, 1991, 1992, and 1993. At that time, the Commonwealth of Pennsylvania was participating in the (now defunct) Aid to Families with Dependent Children program (AFDC), which was a joint Federal and State program

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[2] "Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*. . . ." Hanover ***National Bank v. Moyses***, 186 U.S. 181, 192 (1902).

to provide cash benefits to needy families. ***C.K. v. New Jersey Department of Health & Human Services,*** 92 F.3d 171 (3rd Cir. 1996). AFDC payments were composed of a combination of Federal and State funds. ***Id.*** The Debtors do not argue that the Commonwealth's participation in the AFDC program constituted a constructive waiver of its Eleventh Amendment immunity. Rather, Debtor contend that it is illogical to construe the **Eleventh Amendment** to permit a State to assert that it is immune from a Federal Bankruptcy action, when the disputed debt involves monies that were paid to Debtors through a joint Federal and State program.

When Congress assigns money to a State under its **Article One Section 8** spending power it has the right to give it under the terms and conditions it sees fit. ***King v. Smith,*** 20 L.Ed2d 1118 (1968); ***State of Nevada v. Skinner,*** 884 F.2d 445 (9th Cir. 1989); ***State of South Dakota v. Adams*** 506 F.Supp. 50 (D.C.S.D. 1980). This power arises from **Article One Section 8 Clause One** and **Article One Section 8 Clause 18**, which gives Congress the right to spend money for the General Welfare of the United States and the authority to enact whatever laws are necessary and proper to achieve these goals. **United States Constitution Article One Section 8 Clause One; United States Constitution Article One Section 8 Clause Eighteen;** ***McCullough v Maryland,*** 17 U.S. (4 Wheat) 316 (1819).

This power provides Congress the authority to regulate areas indirectly that it generally does not have the authority to affect. ***Gorrie v.***

Bowen, 809 F.2d 508 (8th Cir. 1987). Any State law or regulation inconsistent with the Federal terms and conditions is invalid. ***King supra***. There is no dispute that the Aid to Families with Dependent Children, Medicare, and the Social Security acts are valid Congressional delegations of power under its spending authority. ***Children's and Parent's Rights Ass'n of Ohio Inc.***, 787 F.Supp 724 (N.D. Ohio 1991); ***Vermeulen v. Kender***, 599 F.Supp 1217 (D.C. Mich. 1984); ***Mertrolina Family Practice Group P.A. v. Sullivan***, 767 F.Supp 1314 (W.D.N.C. 1989).

By granting Pennsylvania, sovereign immunity the Court erred and improperly elevated the interest of the State over the Congressional right to disburse money under the terms and conditions that it saw as fit. This in turn permits Pennsylvania to continue to collect money in violation of the overall Federal scheme for Social Security and Bankruptcy. As in ***Hechinger***, Pennsylvania cannot be immune from Congressional regulation. Such action by the Commonwealth is unconstitutional and must be enjoined.

Although the Third Circuit Court had ultimately concluded that DPW could assert its **Eleventh Amendment** immunity in this case, Debtors believe that the Bankruptcy Court would have assumed jurisdiction over that portion of the debt representing the Federal share of the welfare payments at issue in this case.

(c) The Analysis in *Sacred Heart* Relied Upon Dicta Taken From *Seminole Tribe*.

The holding in ***Sacred Heart*** that **11 U.S.C. § 106** was unconstitutional was, in part, based on the Supreme Court's decision in ***Seminole Tribe***. However, the specific issue in ***Seminole Tribe*** was whether the Eleventh Amendment prevented Congress from interfering with State sovereign immunity through the Indian Commerce Clause, and not whether a State was immune in a bankruptcy proceeding. The majority opinion in ***Seminole Tribe*** did not resolve, or even raise the issue of whether the Eleventh Amendment precludes a suit under the Bankruptcy Code against a State in Federal Court. Moreover, ***Seminole Tribe*** did not resolve the issue, and the Debtors' research has not discovered any case where the Supreme Court has held that that the Eleventh Amendment prevents Congress from abrogating the sovereign immunity under the Bankruptcy Clause.

Plainly, the Supreme Court did not fully consider issue of State sovereignty in bankruptcy proceeding in ***Seminole Tribe***. The portion of ***Seminole Tribe*** relied upon in ***Sacred Heart***, therefore, was dicta. ***In re Hood***, 262 B.R. 412 (6th Cir. BAP 2001) (considers the Supreme Court's summary treatment of the bankruptcy issue, the Court concluded that the dicta in ***Seminole Tribe*** were entitled to little weight). Dicta, of course, do not constitute binding precedent. ***Colgrove v. Battin***, 413 U.S. 149 (1973). Congress's Bankruptcy Power is distinguishable from its Commerce Power because the Bankruptcy Power

involves the right to forgive debts including debts owed to States, while the Commerce Powers do not necessarily involve these rights.

Further, the holding in ***Seminole Tribe*** must be limited to its facts. ***Seminole Tribe*** involved the **Indian Gaming Act.**[3] In that Act, the Congress inexplicably delegated its authority under **Article One of the Constitution** to both the State and the Tribe to legislate Indian Gaming within the State's borders. It was only when the Tribe believed that the State was not negotiating in good faith could the Tribe then sue the State in Federal Court and have the Court fashion a remedy.

This Statute on its face violated sound principles of Federalism because Congress authorized the Tribe to enter its Courts to have its Courts legislate a State matter. Clearly while Congress has the Article III power to state the jurisdiction of its Court, it does not have the power to allow its Court to legislate a State matter or deciding a State policy. Instead, Congress has the authority to set the base line standards that States must follow in formulating State policy.

The key was that in the enactment of the **Indian Gaming Act** Congress delegated to the State and the Indian Tribe Federal powers. Congress does not have the authority to give away its Constitutionally proscribed powers. Congress could not authorize the State of Florida to promulgate rules

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[3] **25 U.S.C. §2703 et. seq.**

and regulations concerning the citizenship and authorization for stay of Mexican immigrants within its borders. Instead of enacting the Statute as it did, Congress should have enacted simple base line standards for all Tribe and States to follow as part of its authority to regulate trade among the Indian Tribe. For example, a Federal Rule that limited the State to tax the Indian authorities 2% of gross gaming revenues would have been a valid exercise of **Federal Article One Power**. Because the Federal scheme promoted differing results depending upon the State and the Tribe and because Congress improperly delegated its Federal Constitutional Powers the *Act* was ultra vires and beyond the power of Congress to enact.

Statutes enacted by Congress are presumed to be constitutional, ***Planned Parenthood of Central New Jersey v. Farmer***, 220 F.3d 127 (3rd Cir. 2000), and a Court must resort to every reasonable construction of a statute in Order to save it from unconstitutionality. ***Saxe v. State College Area School District***, 240 F.3d 200 (3rd Cir. 2001). In Debtors' view, the dicta contained in ***Seminole Tribe*** are not a sufficient ground to overcome the presumption that **Section 106 of the Bankruptcy Code** is constitutional.

(d) The States Ceded Their Sovereignty Over Matters Related To Bankruptcy as Part of the Plan of the Constitutional Convention

In ***Bliemeister*** **and** ***Hood***, the Courts, after an exhaustive analysis of the history of the Constitutional Convention, concluded, correctly in Debtors' view, that the State's sovereign immunity had been abrogated as part of the plan of the original Constitution.

At the time the Constitution was created, the historical milieu demanded the imposition of *uniform* bankruptcy laws—a legal uniformity that was incompatible with State sovereignty. The ***Bliemeister*** Court observed:

> **In the Colonies thousands of Debtors were imprisoned, and while several States passed discharge provisions they were constitutionally suspect when applied to nonresident creditors. Indeed, some States had passed private acts to relieve individual Debtors, which raised sovereignty questions when applied to creditors from other States and undoubtedly led to the concern for uniformity. Consequently, bankruptcy law, and particularly the discharge was very much an issue involved with States' sovereignty, because it was a limitation on the power of the sovereign to imprison Debtors and punish traitors, or to grant individual relief. *When the***

> *States agreed to a uniform Federal rule, they had to understand that they were surrendering their sovereignty over the subject of bankruptcies.*

Id., 251 B.R. at 390-91 (citation and footnote omitted) (emphasis added). Furthermore, relying heavily on the Writings of Alexander Hamilton in **Federalist No. 32** concerning the Article I naturalization power and its parallel in the Bankruptcy Clause, the *Hood* and *Bliemeister* Courts reasoned that the States surrendered their sovereign power on the subject of bankruptcy. As the bankruptcy panel in *Hood* Stated:

> **The Panel agrees that the States ceded their sovereignty over bankruptcy matters at the Constitutional Convention, just as Hamilton concluded that the States ceded sovereignty over naturalization matters. As noted, Hamilton observed that allowing the States to establish distinct rules regarding naturalization would mean that there would be not uniform rules. That observation would apply with equal force in the context of bankruptcy . . . .**
>
> **Moreover, the second of Hamilton's grounds upon which the States yielded their sovereignty also applies in the bankruptcy context. Here Hamilton concluded that State sovereignty was yielded when the Constitution grants authority to Congress while explicitly prohibiting that authority to the States.**

> **'The bankruptcy clause entails an ability to impair the obligation of contracts, a power that was expressly denied to the States by art. I, sect. 10. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 . . . (1902). *Bliemeister*, 251 B.R. at 389.**

Hood, 262 B.R. at 419.

Under the above reasoning, **Section 106 of the Bankruptcy Code** was not unconstitutional, but rather reflected the long-standing relinquishment by the States of their sovereignty in the area of bankruptcy, as evidenced by the uniformity requirement of the Bankruptcy Clause. *See* Leonard H. Gerson, **A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine**, 74 Am. Bank. L.J. 1 (2000).

Debtors are aware that, in ***Sacred Heart***, the Third Circuit concluded that the uniformity requirement of the Bankruptcy Clause means only geographic uniformity, applying the concurring view of Justice Frankfurter in ***Vanston Bondholders Protective Comm. V. Green***, 329 U.S. 156 (1946). Justice Frankfurter Stated:

> **The constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a Debtor are treated alike by bankruptcy administration throughout the country, regardless of the State in which the Bankruptcy Court sits. To establish uniform laws of bankruptcy**

> **does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a Bankruptcy Court. . . .**

Vanston, 329 U.S. at 173-73 (citations omitted).

Debtors believe that the *Sacred Heart* Court erred in relying on the concurring view in *Vanston*. The *Hood* Court took issue with Third Circuit's reliance on Justice Frankfurter's concurring opinion, observing that "only two other Justices joined Justice Frankfurter and the majority rejected so simple a view of the uniformity requirement." *Id.*, 262 B.R. at 428. Moreover, the issue in *Vanston* was the applicability of State law in Bankruptcy Court, and not the right of the States to assert their sovereign immunity and avoid the jurisdiction of the Bankruptcy Courts. Justice Frankfurter was writing in response to the argument that the uniformity provision of the Bankruptcy Clause of the United States Constitution was compromised, because the fate of bankruptcy claims would be left to the whim of State law. In contrast, in the instant case, the question is whether the fate of Debtors' bankruptcy claim will be subject to the whim of DPW's to allow itself to be sued in Bankruptcy Court, which is a different issue.

(e) When Taken To Its Logical Ends Permitting State Sovereign Immunity Frustrates the Congressional Policy of Requiring the Debtors To Pay All Priority Debts And It Leads To An Illogical Result.

The Commonwealth has an obligation to show the accuracy of its claim to its citizens. A citizen of a State has the right to dispute the claim of a State in a Court of Law. To rule otherwise invites arbitrary action and gross abuse of power by the State against its citizenry. It violates the **Fourteenth Amendment to the United States Constitution**. Congress has the right to regulate State and private conduct using its Article One powers.

As part of this regulatory scheme, Congress requires Debtors to pay priority debts. **11 U.S.C.§ 507**. Priority debts are special unsecured debts paid after secured debts but before payment of general unsecured debts. ***Id.*** Priority debts include debts owed the government including child support and taxes. **11 U.S.C. §507(a)(7), 11 U.S.C.§507(a)(8).** In order to establish entitlement to a priority debt the government usually files a proof of claim with the Court.

However, in practice often it is not the case that proofs of claim are filed with the Court. This leads to difficulty, as the Debtor may know they owe a tax or a support debt to the State, but may not know the correct amount. The Debtor may underreport the amount of a tax or support debt in order to have a lower payment in a Chapter 13 bankruptcy or to

avoid paying the tax altogether. On the other hand, the Debtor may over report the amount of tax owed and pay more than what it would be required to pay. The best example is the determination of priority status of a tax.

If the State did not consent to the Bankruptcy Court's jurisdiction the Debtors and a Trustee are stripped of the opportunity to have a Court of competent jurisdiction determine what the Debtor owes and its treatment under the regulatory scheme. It results in losses of money and property to other unsecured creditors without Due Process of Law. Notwithstanding the problem with the determination of status, the State if it had sovereign immunity would not be prevented, after the bankruptcy, from filing for a wage attachment and collecting an otherwise dischargeable debt. The State also could act such as imposing a wage attachment or even arresting the Debtor over a dischargeable debt while the case was pending. This would again frustrate the purpose of having an orderly reorganization of the Debtors' debts or an orderly liquidation and sale of the Debtors' assets.

Statutes must be construed to avoid reaching an illogical result. It is a reviewing Court's duty to construe a statute to give life to all of its clauses. The State government cannot be immune to all Federal regulation. ***Hechinger,*** at 313-314 . Providing State sovereign immunity frustrates Congress's overall regulatory scheme for bankruptcy. It permits Debtors to conceal debts and it allows the Commonwealth to collect possibly more than what it

is entitled to receive all without the benefit of Due Process including notice and a hearing. It interferes with the Bankruptcy Code's purpose of having an orderly liquidation of the Debtors' assets. This illogical result must be avoided and the statute construed to give effect to Congressional intent.

(f) Applying *Sacred Heart* to the Instant Case Denies Mr. and Mrs. Askey the Remedy of Bankruptcy.

DPW is the only significant creditor in this case. ***Sacred Heart***, however, essentially confers upon DPW the exalted status of super-creditor, creating an impenetrable shield around DPW that prevents Debtors from discharging the only substantial debt they owe. Unless they can discharge this claim, for all practical intents and purposes Debtors have no remedy in bankruptcy.

By allowing DPW to assert an Eleventh Amendment immunity to this claim, the basic policy of the bankruptcy system is compromised. This policy was eloquently summarized by the Fourth Circuit in ***Collins***, which Court made this critical statement concerning the necessity of Federal jurisdiction over the discharge of debts to a State:

> **The power of Bankruptcy Courts to discharge a debt is fundamental to our bankruptcy system. If a State could assert Eleventh Amendment immunity to avoid the effect of a discharge Order, the bankruptcy**

> **system would be seriously undermined. A person owing debts to a State could never have those debts discharged by a Bankruptcy Court unless the State agreed. Debtors owing money to States could not be assured of the opportunity for a 'fresh start' heretofore guaranteed by the bankruptcy laws. . . . This purpose can only be fulfilled today if the Bankruptcy Courts retain the power to discharge debts, including debts owed to States . . .**

In re Collins, 173 F.3d at 930.

Debtors want an opportunity for a fresh start. The only way Debtors will receive this opportunity is to discharge their debt to DPW. The Bankruptcy Clause is distinguishable from the Commerce Clause, as it necessarily requires Court intervention between citizen qua State. The Askey only want this opportunity; their day in Court.

CONCLUSION

Wherefore the Petitioner prays that this Court grant the Writ of Certiorari as to the question in this case.

Respectfully Submitted,

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APPENDIX

1. U.S. Bankruptcy Court for the W.D. of PA, Opinion of February 14, 2001... ..... App. 1-12

2. U.S. District Court for the W.D. Of PA, Opinion of February 12, 2001..... ..... App. 13-21

3. Not Precedential Opinion, U.S. Third Circuit Court of Appeals, November 27, 2002 ..... App. 22-25

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
JOHN W. ASKEY and BARBARA ASKEY,	**Bankruptcy No. 00-00-22163-BM**
Debtors	**Chapter 7**
**********	
JOHN W. ASKEY and BARBARA ASKEY,	
Plaintiffs	
v.	**Adversary No. 00-2266-BM**
COMMON WEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	
Defendant	**Defendant's Motion to Dismiss**

Appearances: David A. Colecchia, Esq., for Plaintiffs
William Ryan, Esq., for Defendant

MEMORANDUM OPINION

Commonwealth of Pennsylvania Department of Public Welfare (hereinafter "PADPW"), defendant in the above adversary action, has brought a motion to dismiss the above adversary action against it. PADPW maintains, among other things, that it is immune to debtors' lawsuit under the Eleventh Amendment to the United States Constitution. Debtors John and Barbara Askey oppose the motion of PADPW and have responded with a motion of their own to strike PADPW's supplemental brief in support of its motion to dismiss. We will dismiss debtors' complaint in light of the Eleventh Amendment. It will not be necessary for us to address the debtors' motion to strike in light of the resolution of PADPW's motion to dismiss.

-FACTS-

Debtors are husband and wife and reside in Pennsylvania. They have three minor children.

PADPW is an agent or instrumentality of the Commonwealth of Pennsylvania

Debtors separated in 1989 and reconciled at some unspecified time thereafter. Debtor Barbara Askey received welfare assistance for herself and their three children beginning in 1990 and until some time in 1993.

Some six years later, in April of 1999, The Court of Common Pleas of Westmoreland County,

Pennsylvania, issued an order directing debtor John Askey to pay $50,00 per month to the Domestic Relations Section of the court and setting arrears for child support at $12,212.00. Both debtors consented to the order. His wages were attached and debtors' 1998 and 1999 federal income tax refunds were intercepted and applied towards these obligations.

The court issued another order in February of 2000 in connection with the placement of one of the debtors' children in a youth detention camp for thirty days. It directed debtor John Askey to pay $25.00 per month to the Domestic relations Section of the court and set arrears for child support at $132.00.

Debtors filed a voluntary joint chapter 13 petition on March 4, 2000. The bankruptcy schedules listed a disputed debt in the amount of $11,746.24 for child support owed by debtor John Askey to "Westmoreland County Community".

Debtors initiated the above adversary action against the Commonwealth of Pennsylvania on June 26, 2000. Count I of the complaint seeks a determination that the above disputed debt for child support is not excepted from discharge by virtue of 11 U.S.C. § 523(a)(5) and thus, is dischargeable. Count II seeks, in accordance with 11 U.S.C. § 547(b), to avoid the above wage attachments and interceptions of debtors' federal income tax refunds and to recover them in accordance with 11 U.S.C. § 550(a). It also seeks an injunction prohibiting the Commonwealth from taking further action to collect the debt for child support.

On July 26, 2000, the Commonwealth brought the present motion to dismiss the above adversary action debtors had brought against it.

Upon debtors' own motion, their chapter 13 case was converted to a chapter 7 proceeding and a chapter 7 trustee was appointed on August 16, 2000. Both the underlying bankruptcy case and the present adversary action were reassigned to his member of the court that same day.

Four creditors, but not PADPW, have filed proofs of claim in debtors' bankruptcy case.

Debtors brought a motion on October 16, 2000, to amend the caption of their complaint in the above adversary action to reflect that PADPW was the proper defendant.

On November 30, 2000, debtors brought a motion to strike PADPW's supplemental brief in support of its motion to dismiss.

After conduction of the §341 meeting subsequent to conversion of the case to a chapter 7 proceeding, the chapter 7 trustee reported on December 13, 2000, that it was a no-asset case.

A hearing on debtors' motion to amend the caption of their complain on PADPW's motion to dismiss, and debtors' motion to strike were held on January 11, 2001. We granted the motion to amend

the caption of the complaint and took the other matters under advisement.

-DISCUSSION-

PADPW asserts that the complaint against it should be dismissed because, among other reasons, it is immune to this adversary action under the Eleventh Amendment of the United States Constitution, which provides as follows:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although its language does not expressly so provide, the Eleventh Amendment also applies to suits brought against a state by one of its own citizens. Elderman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974). Sovereign immunity is based on the theory that each states is a sovereign entity in our federal system and, as such, is not amenable to suit in a federal court by any person without its consent. Hans v. State of Louisiana, 134 U.S. 1, 13, 10 S.Ct. 504, 506, 33 L.Ed. 842 (1890).

The phrase "against one of the United States" occurring in the Eleventh Amendment encompasses not only suits in which a state itself is named as a defendant, but also suits brought against an "arm of the state". Regents of the University of California v.

Doe, 519 U.S. 425, 429-30, 117 S.Ct. 900, 904, 137 L.Ed.2nd 55 (1997). It is not disputed in this instance that PADPW is such an "arm" of the Commonwealth of Pennsylvania.

The type of relief sought by a plaintiff is not relevant to the question whether the Eleventh Amendment applies to a lawsuit. It applies even when no monetary relief is sought. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 57, 116 S.Ct. 1114, 1124, 134 L.Ed.2d 252 (1996).

The Eleventh Amendment is not an absolute bar to the bringing of a suit against a state in federal court. A state may, for instance, waive its Eleventh Amendment sovereign immunity and consent to a suit against it in federal court. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). PADPW has neither waived its sovereign immunity nor consented in any way to the present lawsuit. It has not, for instance, filed proof of claim in the underlying bankruptcy case even though debtors listed its claim as disputed.

Congress also may abrogate Eleventh Amendment sovereign immunity, but only if: (1) it unequivocally has expressed in intent to do so; and (2) the abrogating legislation was enacted pursuant to a provision in the United States Constitution giving it the power to do so in that particular instance. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984).

Debtors' adversary action, we have noted, is brought pursuant to 11 U.S.C. §§523(a)(5), 547(b), and 550(a). Section 106b of the Bankruptcy Code purports to abrogate the sovereign immunity of a state. It provides in relevant part as follows:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections ... 523,...547 [and] ...550 of this title ...
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
> (3) The court may issue against a governmental unit an order ... or judgment under such sections ..., including an
> (4) order or judgment awarding a money recovery, but not
> (5) including an award of punitive damages ...
> (6) The enforcement of any such order ... or judgment against any

> governmental unit shall
> be consistent with
> appropriate
> nonbankruptcy law
> applicable to such
> governmental unit ...

11 U.S.C. §106.

PADPW is an agency of the Commonwealth of Pennsylvania and therefore qualifies as a "governmental unit" for purposes of § 106(a). 11 U.S.C. § 101(27).

When Congress enacted § 106(a), it unequivocally intended to abrogate a state's Eleventh Amendment sovereign immunity in connection the Bankruptcy Code provisions therein enumerated. Sacred Heart Hospital of Norristown v. Commonwealth of Pennsylvania Department of Public Welfare (In re Sacred Heart Hospital of Norristown), 133 F.3d 237, 243 (3d Cir. 1998).

It therefore follows from the foregoing that § 106(a) effectively abrogates PADPW's sovereign immunity in this adversary action only if Congress enacted § 106(a) pursuant to some constitutional provision granting it power to do so in this instance.

At one time there were two recognized constitutional wellsprings from which Congress could derive power to validly abrogate Eleventh Amendment sovereign immunity. One source was the Commerce Clause of Article I of the Constitution.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20. 109 S.Ct. 2275, 2284, 105 L.Ed. 2d 1 (1989). The other source was § 5, the so-called enforcement provision, of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671, 49 L.Ed. 614 (1976).

In a change of heart, the United States Supreme Court has concluded that Article I cannot be used to abrogate Eleventh Amendment sovereign immunity. Seminole Tribe, 517 U.S. at 72-73, 116 S.Ct. at 1131-32. The sole remaining constitutional source for abrogating Eleventh Amendment sovereign immunity is § 5 of the Fourteenth Amendment. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 131 F.3d 353, 358 (3d Cir. 1997), *aff'd.* 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).

Congress did not enact § 106(a) of the Bankruptcy Code pursuant to § 5 of the Fourteenth Amendment. What evidence there is indicates that it was enacted pursuant to the Bankruptcy Clause of Article I. Sacred Heart Hospital, 133 F.3d 244. There is no defensible basis for differentiating the Bankruptcy Clause from other Article I clauses - e.g., the Commerce Clause - when considering whether Congress may abrogate Eleventh Amendment sovereign immunity when enacting specific legislation.

It therefore follows that § 106(a) violates the United States Constitution to the extent that it

purports to abrogate PADPW's Eleventh Amendment sovereign immunity. *Id.* 133 F.3d at 245.

Based on the foregoing, we conclude that we may not hear and determine the above adversary action and may not issue any order or judgment against PADPW but instead must dismiss it in its entirety.

Debtors, we previously noted, have brought a motion to strike a brief submitted by PADPW. There is no need to address this motion in light of the resolution of PADPW's motion to dismiss.

An appropriate order shall issue.

"s/ Bernard Markovitz".
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

Dated: 2-14-01

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
JOHN W. ASKEY and BARBARA ASKEY,	**Bankruptcy No. 00-22163-BM**
Debtors	**Chapter 7**
**********	
JOHN W. ASKEY and BARBARA ASKEY,	
Plaintiffs	
v.	**Adversary No. 00-2266-BM**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	
Defendant	**Defendant's Motion to Dismiss**

ORDER OF COURT

AND NOW at Pittsburgh this 14th day of February, 2001, in accordance with the above memorandum opinion, it hereby is **ORDERED, ADJUDGED,** and **DECREED** that the motion to dismiss by Commonwealth of Pennsylvania Department of Public Welfare is **GRANTED**. The above adversary action hereby is **DISMISSED**.

It is **SO ORDERED**.

"s/ Bernard Markovitz".
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	
JOHN W. ASKEY and BARBARA ASKEY,	**Bankruptcy No. 00-22163-BM**
Debtors	**Chapter 7**
**********	
JOHN W. ASKEY and BARBARA ASKEY,	
Plaintiffs	
vs.	**Civil Action No. 01-640**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	**Adversary No. 00-2266 BM**
Defendant	

MEMORANDUM ORDER

On March 4, 2000, plaintiffs, John W. Askey and Barbara Askey, filed a voluntary joint Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Western District of Pennsylvania, which was docketed at Bankruptcy No. 00-22163.

Thereafter, on June 26, 2000, plaintiffs filed an adversary proceeding against the Commonwealth of Pennsylvania (the Commonwealth) under 11 U.S.C. §§ 523 (a)(5), 547(b) and 550(a), which was docketed at Adversary No. 00-2266.

In Count I of the adversary proceeding, plaintiffs sought a determination that a disputed debt to the Commonwealth's Department of Public Welfare (PaDPW) for child support and a debt to the Juvenile Probation Department of Westmoreland County for the cost of placing plaintiffs' son in a juvenile motivational camp for 30 days are no excepted from discharge in the bankruptcy proceeding, and that, therefore, the debts are dischargeable. In Count II, plaintiffs sought to recover monies for child support collected for PaDPW by the Domestic Relations Section of the Court of Common Pleas of Westmoreland County, Pennsylvania through an attachment on Mr. Askey's wages and the interception of plaintiffs' income tax refunds for the years 1998 and 1999. Plaintiffs also sought an injunction in Count II to enjoin the Domestic Relations Section of the Court of Common Pleas of Westmoreland County, Pennsylvania from attempting in the future to collect the disputed debt to PaDPW for child support from plaintiffs by wage attachment, interception of income tax refunds or any other means.

On July 26, 2000, the Commonwealth filed a motion to dismiss plaintiffs' adversary proceeding in the bankruptcy court pursuant to Fed.R.Civ.P. 12(b)(6), asserting that (a) plaintiffs failed to join an

indispensable party, Westmoreland County, in connection with the portion of plaintiffs' complaint seeking a determination that the debt owed to the Juvenile Probation Department of Westmoreland County for the placement of plaintiffs' son in a motivational camp is dischargeable in plaintiffs' bankruptcy proceeding; (b) the debt of Mr. Askey for child support is nondischargeable; and (c) the Eleventh Amendment to the United States Constitution bars plaintiffs' attempts to obtain a money judgment against the Commonwealth arising out of the disputed debt to PaDPW for child suuport.[1]

On August 22, 2000, plaintiffs filed a motion to add Westmoreland County as a defendant in the adversary proceeding and to amend the caption to reflect PaDPW as the Commonwealth agency that has an interest in the adversary proceeding. On September 11, 2000, the Honorable Bernard Markovitz entered an order setting a date for responses to plaintiffs' motion to amend and scheduling a hearing on plaintiffs' motion to amend for October 10, 2000.

In a memo completed in connection with the October 10th hearing, Judge Markovitz noted that plaintiffs' motion to amend their complaint to add Westmoreland County as a defendant in the adversary proceeding was withdrawn based on a

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[1] On August 16, 2000, the Honorable Judith K. Fitzgerald signed an order converting plaintiffs' Chapter 13 proceeding in the bankruptcy court to a Chapter 7 proceeding and reassigning plaintiffs' case to the Honorable Bernard Markovitz.

printout supplied by the proper official of Westmoreland County showing that Mr. Askey did not owe any money to Westmoreland County with respect to the placement of his son in a juvenile motivational camp for 30 days. In a separate memo concerning the October 10th hearing, Judge Markovitz noted that plaintiffs were to submit a brief in opposition to the Commonwealth's motion to dismiss with 30 days, and that the Commonwealth could file a reply brief within 15 days thereafter.

On October 16, 2000, plaintiffs filed a second motion to amend in which they sought, solely, to amend the caption of the adversary proceeding to reflect PaDPW as the proper defendant. On November 1, 2000, plaintiffs filed their brief in opposition to the Commonwealth's motion to dismiss, which was captioned "Brief in support of Debtors Petition to Determine Dischargeability of a Debt." Plaintiffs' entire brief was devoted to the issue of the dischargeability of Mr. Askey's child support obligation to PaDPW under the Bankruptcy Code. Plaintiffs totally failed to address the Eleventh Amendment issue raised by the Commonwealth in the motion to dismiss. In response to plaintiffs' brief in opposition to its motion to dismiss, the Commonwealth filed a supplemental brief in accordance with Judge Markovitz's direction at the October 10th hearing to address plaintiffs' arguments concerning the dischargeability of Mr. Askey's child support obligation to PaDPW.

By orders dated November 30, 2000, Judge Markovitz scheduled a hearing on the

Commonwealth's motion to dismiss and a hearing on plaintiffs' motion to amend the caption in the adversary proceeding for January 11, 2001. On the same day, plaintiffs filed a motion to strike the Commonwealth's supplemental brief, arguing that "Judge Markovitz's order did not allow for the filing of a Response Brief" by the Commonwealth and that the Commonwealth's brief impermissibly raised a new issue. The following day, December 1, 2000, Judge Markovitz entered an order adding plaintiffs' motion to strike the Commonwealth's supplemental brief to the motions to be address at the hearing scheduled for January 11, 2001.[2]

Following the January 11th hearing, Judge Markovitz filed a memo indicating that plaintiffs' motion to amend the caption of the adversary proceeding to reflect PaDPW as the proper defendant was granted. He also filed memos after the January 11th hearing indicating that he decisions on the Commonwealth's motion to dismiss and plaintiffs' motion to strike would be taken under advisement.

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[2] The Commonwealth filed a response to plaintiffs' motion to strike on December 5, 2000 noting, inter alia, that the allegedly new issue raised by the Commonwealth in its supplemental brief in support of the motion to dismiss was actually raised by plaintiffs in their brief in opposition to the motion to dismiss; that Judge Markovitz specifically indicated that PaDPW could filed a brief in reply to plaintiffs' brief in opposition; and that, because plaintiffs were permitted to file another response to the motion to dismiss before the hearing schedule on the pending motions, plaintiffs were in no way prejudiced by the Commonwealth's supplemental brief.

On February 14, 2001, Judge Markovitz filed a memorandum opinion in which he granted PaDPW's motion to dismiss based on the conclusion that PaDPW was immune from plaintiffs' adversary proceeding under the Eleventh Amendment. Judge Markovitz noted that the Eleventh Amendment encompasses not only suits in which a state itself is named as a defendant, but also suits brought against an arm of the state, such as PaDPW. Judge Markovitz also noted that PaDPW had neither waived its sovereign immunity from plaintiff's adversary proceeding nor consented to plaintiffs' adversary proceeding. Judge Markovitz then held that, although Section 106(a) of the Bankruptcy Code, 11 U.S.C. § 106(a), purports to abrogate the sovereign immunity of a state, Section 106(a) violates the United States Constitution.[3] Therefore, Jude Markovitz concluded that he was compelled to dismiss plaintiffs' adversary proceeding in its entirety.[4]

In support of the conclusion that Section 106(a) of the Bankruptcy Code is unconstitutional, Judge Markovitz relied on the decision of the United States Court of Appeals for the Third Circuit in In re Sacred Heart Hospital of Norristown, 133 F.3d 237, 243 (3d Cir. 1988). In Sacred Heart, a Chapter 11 debtor hospital brought an adversary proceeding against PaDPW to recover amounts allegedly due for services

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[4] In light of his conclusion that the Eleventh Amendment barred plaintiffs' adversary proceeding against PaDPW, Judge Markovitz determined that there was no need to address plaintiffs' motion to strike the supplemental brief submitted by PaDPW in support of its motion to dismiss, which was limited entirely to the dischargeability issue.

rendered under a medical assistance program. PaDPW moved to dismiss the adversary proceeding based on Eleventh Amendment immunity. The bankruptcy court denied the motion and, thereafter, entered an order granting declaratory judgment in favor of the debtor-hospital. PaDPW appealed, and the district court reversed the denial of the motion to dismiss, vacated the order for declaratory judgment and remanded the case to the bankruptcy court. The debtor-hospital then appealed, and the Third Circuit affirmed, holding that, although Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity in Section 106(a) of the Bankruptcy Code, Congress did not act pursuant to a valid exercise of its power. Therefore, Section 106(a) is unconstitutional.

In their appeal, plaintiffs assert that, although PaDPW asserted sovereign immunity in its motion to dismiss their adversary proceedings, it did not brief this issue, and that, based on this omission, plaintiffs did not address the issue of sovereign immunity in its brief in opposition to the motion to dismiss. To the extent plaintiffs are contending that PaDPW waived the issue of sovereign immunity by failing to address the issue in its brief in support of the motion to dismiss, the court finds this argument meritless. A review of the brief filed by PaDPW in support of the motion to dismiss reveals that PaDPW did address the sovereign immunity issue, albeit briefly. (Brief in Support, pp. 5-6). In any event, the issue of sovereign immunity under the Eleventh Amendment was clearly raised in PaDPW's motion to dismiss. Under

the circumstances, PaDPW did not waive the issue of sovereign immunity.

Plaintiffs also assert that Judge Markovitz failed to apply the proper standard in ruling on PaDPW's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, plaintiffs contend that, under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), they could have amended their complaint to sue the Secretary of PaDPW for prospective injunctive relief, and that, in ruling on PaDPW's motion to dismiss, Judge Markovitz failed to consider "whether relief was available to them under any theory." (Brief on Appeal, pp. 10-11). After consideration, the court finds plaintiffs' argument in this regard unpersuasive. As noted by PaDPW. there is no evidence that plaintiffs ever sought leave from the bankruptcy court to substitute the Secretary of PaDPW as the defendant in their adversary proceeding or to amend their complaint to limit the requested relief to prospective injunctive relief against the Secretary of PaDPW under the doctrine of Ex Parte Young. Moreover, there is no evidence that plaintiffs filed a motion for reconsideration of Judge Markovitz's decision regarding Eleventh Amendment immunity to raise the issue of prospective injunctive relief against the Secretary of PaDPW. Accordingly, this issue has been waived for purposes of this appeal,[5] and plaintiffs' appeal will be dismissed.

Finally, the court declines plaintiffs' invitation to "reconsider and overrule" the Third Circuit's decision in Sacred Heart, supra, based on recent

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[5] In re Sacred Heart, 133 F.3d 237, 241 n.6 (3d Cir. 1988).

district court cases in other circuits which have declined to follow the holding of that case. (Brief on Appeal, p. 19).

AND NOW, this 12th day of February, 2002, IT IS SO ORDERED.

"s/ William L. Standish".
William L. Standish
United States District Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1721

JOHN W. ASKEY;
BARBARA ASKEY,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civil Action No. 01-cv-000640)

Submitted Under Third Circuit LAR 34.1(a)
November 21, 2002

Before: BARRY and AMBRO, Circuit Judges
DOWD* District Judge

(Opinion filed: November 27, 2002)

OPINION

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* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

AMBRO, Circuit Judge

The appellants, John and Barbara Askey, filed in the United States Bankruptcy Court for the Western District of Pennsylvania this adversary proceeding against the appellee, the Commonwealth of Pennsylvania Department of Public Welfare ("DPW"). The DPW filed a motion to dismiss, asserting Eleventh Amendment sovereign immunity from the lawsuit. The Bankruptcy Court granted the motion to dismiss on this ground, and the District Court affirmed. As those courts recognized, this case is controlled by our decision in *In re Sacred Heart Hosp. Of Norristown*, 133 F.3d 237 (3d Cir. 1998), and so we also affirm.

We further agree with the District Court's conclusion that, because the Askeys did not attempt in the Bankruptcy Court to amend their complaint to sue for prospective injunctive relief from the Secretary of the DPW in his official capacity, they waived the *Ex Parte Young*, 209 U.S. 123 (1908), argument that they now seek to present.

Accordingly, we affirm the dismissal of this adversary proceeding.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

"s/ Thomas L. Ambro".
Circuit Judge

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JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on November 21, 2002.

On consideration whereof,

IT IS HEREBY ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated February 14, 2002, is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

"s/ Acting Clerk".

Dated: November 27, 2002